Supreme Court, U. S.
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No. 97-1744

In The

Supreme Court of the United States

October Term, 1997

IN RE: BRUCE YOUNG AND NANCY YOUNG,

Debtors.

JULIA A. CHRISTIANS, TRUSTEE,

Petitioner,

vs.

CRYSTAL EVANGELICAL FREE CHURCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

For their primary argument in opposition to the Trustee's petition for a writ of certiorari, Respondent Church and Intervenor United States assert that a new statute – the Religious Liberty and Charitable Donation Protection Act of 1998 – would require this Supreme Court "inevitably [to] affirm under [the new statute] without reaching any of the issues set out in the petition. . . . " Respondent Church's Brief In Opposition To Petition For Writ Of Certiorari, at 3-4; *see also* Brief For The United States In Opposition, at 8-10. Therefore, the Church and United States conclude, this Court should use the new statute to deny the petition for a writ of certiorari.

The Church and United States are wrong for two reasons.

I. BECAUSE THE COURT OF APPEALS HAS REPUDIATED THE AUTHORITY OF THIS COURT AND HAS REJECTED CONSTITUTIONAL PRINCIPLES OF EXCEPTIONAL IMPORTANCE, THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF APPEALS AND REMAND THE CASE FOR FURTHER CONSIDERATION IN LIGHT OF THE NEW STATUTE.

The decision of the court of appeals is such an overt repudiation of the authority of the Supreme Court, that the decision must not be allowed to stand. By its Order dated June 27, 1997, this Court vacated the earlier judgment of the court of appeals concerning the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb1-4

(1992), and remanded the case to the court of appeals for further consideration in light of *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). Far from obeying *Flores*, however, the court of appeals chose to issue a ruling that is directly contrary to the express holding of *Flores*.

Flores expressly held that "RFRA contradicts vital principles necessary to maintain separation of powers. . . . " *Id.* at 2172. RFRA did so because it was "legislation which alters the meaning of the Free Exercise Clause." *Id.* at 2164; *see also id.* at 2170 (RFRA "attempted a substantive change in constitutional protections"). As an imposition of the Legislature's interpretation of the Constitution on the Judicial Branch, RFRA breached the fundamental principle that it is "the province of the Judicial Branch . . . to say what the law is." *Flores*, 117 S. Ct. 2172 (citing *Marbury v. Madison*, 1 Cranch, at 177); *see also Loving v. United States*, 116 S. Ct. 1737, 1743 (1996) ("It remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.") (citations omitted); *United States v. Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring) (the Supreme Court is "the branch whose distinctive duty it is to declare 'what the law is' ").

Unless the historic principle of *Marbury v. Madison* is now to be eroded, the Legislative Branch is precluded from imposing its interpretation of the Constitution upon the Judicial Branch not merely insofar as the Constitution applies to State law, but insofar as the Constitution applies to all law. Certainly nothing in *Flores* indicates that the province of the Judicial Branch has been limited to declaring the meaning of the Constitution concerning State, but not Federal, law.

Thus when this Court expressly held in *Flores*, 117 S. Ct. at 2172, that RFRA "contradicts vital principles necessary to maintain separation of powers," this Court could not have meant that RFRA's imposition upon the Judicial Branch of the Legislative Branch's interpretation of the Constitution was unacceptable as to State law but acceptable as to Federal law. Rather, in holding true to the principle that it is the province of the Judicial Branch to say what the law is, this Court could only have meant that RFRA's attempted usurpation of this Court's responsibility to interpret the Constitution was invalid as to all law, Federal as well as State.

Yet, in pure repudiation of this Court's express holding that RFRA "contradicts vital principles necessary to maintain separation of powers," *id.*, the court of appeals on remand in the case at bar held that RFRA does not contradict separation of powers concerning Federal law. *See* Appendix at A9-A14. This holding of the court of appeals must be reversed for two reasons of exceptional importance.

First, the court of appeals has circumscribed the holding of *Flores*, despite the fact that this Court expressly instructed the court of appeals to reconsider the case at bar in light of *Flores*. Such a repudiation of the authority of this Court cannot be allowed to stand.

Second, the holding of the court of appeals, that Congress may dictate to the Courts the meaning of the Constitution where Federal law is concerned, marks a dangerous turn away from the principle of separation of powers. Having only recently preserved the separation of powers in *Flores*, despite the array of special interests

behind RFRA, this Court must act in the case at bar to protect the separation of powers from destruction by lower courts who would sacrifice the Constitutional framework of our government in order to embrace the expedient solution that RFRA offers to those who find fault with the Supreme Court's interpretation of the Constitution.

Accordingly, regardless of the impact of the Religious Liberty and Charitable Donation Protection Act of 1998 upon the ultimate resolution of the case at bar, this Court should grant the requested writ of certiorari, summarily reverse the decision of the court of appeals concerning RFRA,[1] and remand the case to the court of appeals for further consideration in light of the Religious Liberty and Charitable Donation Protection Act of 1998. *See, e.g., Rhodes v. Stewart,* 488 U.S. 1 (1988) (summarily reversing where a court of appeals misapprehended controlling Supreme Court precedent); *see also* Robert Stern, Eugene Gressman, Stephen Shapiro, Kenneth Geller, *Supreme Court Practice* § 4.5 at p. 174 (7th ed. 1993).

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[1] Although the United States observes in its Brief in Opposition, at 10, that this Court should avoid questions of constitutionality unless such adjudication is unavoidable, this Court already has decisively ruled in *Flores* on the issue of RFRA's constitutionality.

II. IF THE ENACTMENT OF THE NEW STATUTE CAUSED THIS COURT NOT TO REACH THE ISSUES CONCERNING RFRA, THIS COURT SHOULD AT THE VERY LEAST VACATE THE JUDGMENT OF THE COURT OF APPEALS AND REMAND FOR FURTHER PROCEEDINGS IN LIGHT OF THE NEW STATUTE.

Based upon the recent enactment of the Religious Liberty and Charitable Donation Protection Act of 1998, the Church and United States assert that this Court should use the new statute to deny the petition for a writ of certiorari, **without ever affording the Trustee an opportunity in the lower courts to attack the new statute as unconstitutional.** Such a denial of Due Process clearly would be wrong. Consistent with Due Process, this case cannot be decided against the Trustee on the basis of the new statute until the Trustee has had the opportunity to challenge the constitutionality of the new statute. Therefore, if the enactment of the new statute causes this Court not to grant certiorari to decide the RFRA-related issues raised in the petition, this Court must vacate the decision of the court of appeals and remand for further consideration in light of the new statute. *See Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412 (1972).

In *Diffenderfer,* the plaintiffs sought a ruling that a Florida statute violated the First Amendment insofar as it authorized a tax exemption for church property used as a commercial parking lot. *Id.* at 412-13. After this Court had noted probable jurisdiction of the plaintiffs' appeal, the Florida Legislature repealed the statute at issue and enacted new legislation which provided, in relevant part, that church property was exempt from taxation only if

the property was used predominantly for religious purposes and only to the extent of the ratio that such predominant use bears to the non-exempt use. *Id.* at 413-14.

Because "the only relief sought in the complaint was a declaratory judgment that the now repealed [Florida statute] is unconstitutional . . . and an injunction against its application," this Court stated that the relief sought was "inappropriate now that the statute has been repealed." *Id.* at 414-15.

Although this Court in *Diffenderfer* thus ruled that the newly enacted legislation had rendered the case moot, this Court did not remand the case for dismissal. Instead, this Court held that "[b]ecause it is possible that appellants may wish to amend their complaint so as to demonstrate that the repealed statute retains some continuing force or to attack the newly enacted legislation, . . . we vacate the judgment of the District Court and remand the case to the District Court. . . . . *Id.* at 415; *see also United States Department of Justice v. Provenzano,* 469 U.S. 14 (1984) (where amendment to statute rendered moot the issue before the Supreme Court, the judgments of the lower courts were vacated and the cases were remanded to the courts of appeals for such further proceedings as were indicated).

Analogously to the Florida statute in *Diffenderfer,* Bankruptcy Code § 548, which is the basis of the Trustee's action against the Church in the present case, has now been amended by the Religious Liberty and Charitable Donation Protection Act of 1998. Under the amended § 548, the relief sought by the Trustee would not be appropriate (if the amendment survives scrutiny). Hence

the Religious Liberty and Charitable Donation Protection Act of 1998 moots the case.

As in *Diffenderfer,* this Court must not simply let the case terminate on grounds that the new statute moots this case. Rather, this Court must either vacate, or reverse,[2] the decision of the court of appeals, and remand the case to allow the Trustee to attack the newly enacted Religious Liberty and Charitable Donation Protection Act of 1998 and to demonstrate that former Bankruptcy Code § 548 retains some continuing force.

In the case at bar, the Trustee may well wish, on remand, to attack the Religious Liberty and Charitable Donation Protection Act of 1998 as an unconstitutional violation of the Establishment Clause. Such an attack would have merit, because the purpose of the Act is the non-secular purpose of promoting, in its sponsor's words, "the laws of God." 144 CONG. REC. S4770 (daily ed. May 13, 1998) (statement of Senator Grassley).

Under the rule of *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971), a statute violates the Establishment Clause if it has a non-secular purpose. The purpose of a statute is determined not merely from its text. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."). Rather, this

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[2] For the reasons set forth above in section I of this Reply, this Court may wisely choose not simply to vacate, but to reverse, the decision of the court of appeals before remanding the case.

Court looks to the underlying record to determine the legislature's true purpose. *Id.* at 534-35.

The legislative record concerning the Religious Liberty and Charitable Donation Protection Act of 1998 demonstrates that, although the Act may be facially neutral, its true purpose is to protect churches and the "laws of God" from the requirements that the Bankruptcy Code applies to all others. Senator Grassley, the Act's sponsor, stated:

> Mr. President, I would like to close on this note. When I chaired a hearing on tithing and bankruptcy before my subcommittee late last year, I heard from the pastor of Crystal Free Evangelical Church [sic]. This church is the one fighting right now in the Eighth Circuit Court of Appeals to keep the bankruptcy court out of its church coffers. Pastor Goold testified in a very compelling way about the practical difficulties his church has faced because of the Bankruptcy Code. As Pastor Goold put it, when there's a conflict between the bankruptcy laws and the laws of God, we should change the bankruptcy laws because God's laws aren't going to change.

144 CONG. REC. S4770 (daily ed. May 13, 1998) (statement of Senator Grassley).

Although the Religious Liberty and Charitable Donation Protection Act of 1998 may be facially neutral because it exempts both churches and secular charities from certain parts of the Bankruptcy Code, Senator Grassley makes clear that secular charities were included in the Act merely to create a shield of compliance with the requirement of facial neutrality:

> Mr. President, I think it's important to remember that my bill protects donations to churches as well as other types of nonprofit charities. I did this because many well-respected constitutional scholars believe that protecting only religiously-motivated donations from the reach of the Bankruptcy Code would violate the establishment clause of the first amendment.

144 CONG. REC. S4770 (daily ed. May 13, 1998) (statement of Senator Grassley).

Thus, before this case is decided on the basis of the Religious Liberty and Charitable Donation Protection Act of 1998, the Trustee must be given the opportunity to challenge the Constitutionality of that Act. Accordingly, if this Court believes that the issues in the petition for certiorari should not now be decided because of the new Act, then this Court must vacate the judgment of the court of appeals and remand the case for further proceedings.[3]

CONCLUSION

The decision of the court of appeals repudiates the holding of this Court that RFRA violates the separation of powers. To uphold its authority and to uphold the vital principle of separation of powers, this Court should grant

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[3] The other arguments in the briefs of the Church and the United States are, to the extent they are relevant, addressed in the Trustee's Petition For Writ Of Certiorari, the opinion of the district court (A72-A103), or the opinion of the bankruptcy court (A104-A128).

the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, summarily reverse the decision of the court of appeals, and remand the case for further proceedings in light of the Religious Liberty and Charitable Donation Protection Act of 1998.

In the alternative, this Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further proceedings in light of the Religious Liberty and Charitable Donation Protection Act of 1998.

Respectfully submitted,

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